

No.78611-9
(Court of Appeals No. 23023-6-III)
(Consolidated with 78876-6 and 79074-4)

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Petitioner,

vs.

ARO TE'JHON WILLIAMS-WALKER

Defendant/Respondent.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
HONORABLE JEROME J. LEVEQUE

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SUPPLEMENTAL BRIEF OF RESPONDENT

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A.	IDENTITY OF PARTY.....	4
B.	ISSUES PRESENTED BY CROSS-PETITION.....	4
C.	RESPONDENT’S ISSUE.....	4
D.	SUPPLEMENTAL STATEMENT OF THE CASE.....	4
E.	ARGUMENT.....	8
	1. The failure to comply with the statutory procedure to submit a firearm special verdict to a jury precludes harmless error analysis.....	8
	2. Pursuant to RAP 10.1(g), Williams-Walker adopts and incorporates by reference the arguments of petitioner Graham.....	11
	3. Pursuant to RAP 10.1(g), Williams-Walker adopts and incorporates by reference the arguments of petitioner Ruth.....	13
F.	CONCLUSION.....	13

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Neder v. United States</u> , 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).....	passim
<u>Washington v. Recuenco</u> , 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) (“ <u>Recuenco II</u> ”).....	8

<u>City of Seattle v. Richard Bockman Land Corp.</u> , 8 Wn. App. 214, 505 P.2d 168 (1973).....	12
<u>State v. Argo</u> , 81 Wn. App. 552, 915 P.2d 1103 (1996).....	9
<u>State v. Beals</u> , 100 Wn. App. 189, 997 P.2d 941, <i>rev. denied</i> , 141 Wn.2d 1006 (2000).....	10, 11
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	8
<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	passim
<u>State v. Nam</u> , 136 Wn. App. 698, 150 P.3d 617 (2007).....	12
<u>State v. O'Donnell</u> , 142 Wn. App. 314, 174 P.3d 1205 (2007).....	12
<u>State v. Recuenco</u> , 163 Wn.2d 428, 180 P.3d 1276 (2008) (“ <u>Recuenco III</u> ”).....	11, 12, 13
<u>State v. Recuenco</u> , 154 Wn.2d 156, 162, 110 P.3d 188 (2005) (“ <u>Recuenco I</u> ”).....	passim

Court Rules

RAP 10.1(g).....	11, 13
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A. IDENTITY OF PARTY

Cross-respondent, Aro Te’Jhon Williams-Walker, was the defendant in the trial court and the appellant in the Court of Appeals.

B. ISSUES PRESENTED BY CROSS-PETITION

1. Where the killing was accomplished by the use of a gun and the jury found beyond a reasonable doubt that the defendant was armed with a “deadly weapon” at the time he accomplished the crime, and the jury was instructed only that a “deadly weapon” was a “firearm,” did the trial court err in imposing a “firearm enhancement?”

2. Should this Court reconsider part of its rulings in State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005), *cert. granted* 163 L.Ed.2d 362 (2006), and State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005)?

C. RESPONDENT’S ISSUE

Whether Washington law precludes the imposition of penalties which exceed the facts reflected in the jury’s verdict based on the instructions the jury is given.

D. SUPPLEMENTAL STATEMENT OF THE CASE

Based on an incident that occurred on August 26, 2002, the Spokane County Prosecuting Attorney charged Williams-Walker with

Count I, first-degree robbery while “armed with a deadly weapon, .22 caliber handgun,” and Count II, first-degree felony murder based on the robbery or, in the alternative, premeditated murder. Each count alleged “... and the defendant being at said time armed with a firearm under the provisions of RCW 9.94A.602 and 9.94A.510(3). CP 51-52.

No objections or exceptions to the following proposed jury instructions appear in the record. RP 1495-1504.

The “to convict” instruction for Count I required the jury to find the defendant was armed with a “deadly weapon” during the robbery. Instruction 12 at CP 258.

The jury was separately instructed that the term “deadly weapon” includes “any firearm, whether loaded or not.” Instruction 23 at CP 269.

For purposes of a special verdict, the jury was instructed in part as follows:

[T]he State must prove beyond a reasonable doubt that the defendant ... was armed with a deadly weapon at the time of the commission of the crimes ...

A pistol, revolver, or any other firearm is a deadly weapon, whether loaded or unloaded.

...

RP 1525; Instruction 34 at CP 294.

No further clarification of the term “firearm” was issued to the jury, either with respect to the special verdict or the underlying charges.

The jury found Williams-Walker guilty as charged. (RP 1617) On the special verdict forms, the jurors were asked whether Williams-Walker was armed with a “deadly weapon” when the crimes were committed. The jury answered yes. CP 299, 301.

On the standard form judgment completed and signed by the trial judge, the court made the following additional factual finding:

[X] A special verdict/finding for use of a **firearm** was returned on Counts I and II.

CP 667 (bolding in original). Based on the jury’s affirmative findings of being armed with a deadly weapon, the court imposed two consecutive *firearm enhancements* by adding 120 months (ten years) to the sentence. (RP 1702; CP 672)

By unpublished opinion filed March 21, 2006, Division III affirmed the convictions, but found the imposition of the firearm enhancement was not harmless under State v. Recuenco, 154 Wn.2d 156, 162, 110 P.3d 188 (2005) *cert. granted* __ U.S. __, 126 S.Ct. 478, 163 L.Ed.2d 362 (2005) (hereafter “Recuenco I”). Williams-Walker filed a petition for review; the state filed a cross-petition for review on the firearm

enhancement issue.¹ By Order filed January 3, 2007, this Court denied the petition for review and deferred the State's cross-petition pending its final determination in State v. Recuenco, Supreme Court No. 74964-7.²

On review, the United States Supreme Court reversed Recuenco I to the extent this Court found the error was structural, explaining the error was subject to the harmless error analysis set forth in Neder v. United States, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) (hereafter "Recuenco II"). On remand, this Court concluded that under Washington law, harmless error analysis does not apply where a sentencing factor was not submitted to the jury, and affirmed Recuenco I. State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008) (hereafter "Recuenco III").

This Court subsequently lifted the stay in Williams-Walker's case, granted review of the state's cross-petition, and consolidated the case with two other cases presenting similar issues regarding the firearm

¹ State of Washington v. Aro Te'Jhon Williams-Walker, Supreme Court No. 78611-9.

² The eventual opinion is found at State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008) (hereafter "Recuenco III").

enhancement.³ Williams-Walker asks this Court to hold that under Recuenco III, the imposition of the firearm enhancement was improper, and to remand for resentencing based on the jury's verdicts that he was armed with a deadly weapon.

E. ARGUMENT

1. The failure to comply with the statutory procedure to submit a firearm special verdict to a jury precludes harmless error analysis.

Statutory authority exists whereby a jury can be asked to make a firearm finding. Recuenco III, 163 Wn.2d at 439, 180 P.3d at 1282. This procedure was not complied with here, as a firearm special verdict form was not submitted to the jury. Where a sentencing court fails to comply with the procedures of the Sentencing Reform Act (SRA) and in the absence of an express waiver by the defendant, the remedy is either to remand for resentencing, or where a proper objection was raised in the trial court, a reduction of the sentence. *See, e.g. State v. Ford*, 137 Wn.2d 472, 480-87, 973 P.2d 452 (1999).

³ The cases are State v. Graham, No. 78876-6, and State v. Ruth, No. 79074-4.

In those instances in which courts have applied something akin to harmless-error analysis of sentencing errors, they have simply concluded the resulting sentence did not or would not change as a matter of law, and did not reweigh the evidence or otherwise assess the facts supporting the sentence imposed. *See e.g. State v. Argo*, 81 Wn. App. 552, 569, 915 P.2d 1103 (1996) (concluding remand for resentencing was unnecessary where even if correct appellant's challenge to offender score calculation would only result in reduction from 16 points to 13).

The Argo court stated without comment the error in calculation of the offender score was harmless. *Id.* It is one thing for a reviewing court to conclude that an error reducing an offender score from 16 to 13 points is "harmless" because as a matter of law the sentence does not change. But it is an entirely different matter for a court to conclude that despite some procedural error in the consideration of evidence, the fact finder would have reached the same factual determination.

In the former, the reviewing court is not assessing the evidence to determine if the sentencing court would have or even could have reached the same conclusion that the correct score should be 13. Instead, by saying the answer to the question of whether the score was correctly calculated is irrelevant, such a court is avoiding harmless-error analysis in the

traditional sense all together. However in the latter situation, a reviewing court is reweighing the factual rather than legal underpinnings of the sentence. This scenario does not find support in Washington law.

Instead, where sentencing errors have turned on factual errors or errors in the procedure by which the sentencing court considered the proof, remand has always been required. For example, in State v. Beals, 100 Wn. App. 189, 997 P.2d 941, *rev. denied*, 141 Wn.2d 1006 (2000), the appellant challenged the trial court's determination of the comparability of an out-of-state offense and its reliance on that offense as a prior "most serious offense." Id. at 195. The State had provided and the trial court had considered the facts of the prior offense, but the State did not provide and the sentencing court failed to examine the actual language of the foreign statute. Id.

On review, the Court of Appeals concluded the failure to first consider the statutory language was error which required reversal, saying:

While this court could locate the North Carolina statute then in effect and compare the elements of Beals' conviction with a potentially comparable Washington offense, we decline to do so. The proper forum for classification of out-of-state convictions is at the sentencing hearing, where the State can present necessary documentary evidence, the defendant can refute the State's evidence and arguments, and the court can then engage in the required comparison on the record to determine if the State met its burden of proof. '[C]lassification is a mandatory step in the

sentencing process under the SRA,' and the sentencing court should be required to complete its task.

Beals, 100 Wn. App. at 196 (citation omitted).

Herein, as in Beals, there was a statutory procedure. The State failed to comply with the procedure to seek a firearm sentencing enhancement because it did not submit a firearm special verdict to the jury. The sentencing judge then committed error by imposing a sentence outside the judge's authority, a sentence that was not authorized by the jury.

Recuenco III, 63 Wn.2d at 439, 180 P.3d at 1282. Violation of the statutory procedure requires remand to the trial court for resentencing.

Beals, 100 Wn. App. at 198.

2. Pursuant to RAP 10.1(g), Williams-Walker adopts and incorporates by reference the arguments of petitioner Graham.

RAP 10.1(g) provides that where cases are consolidated for review, a party may adopt by reference any part of the brief of another. Pursuant to this rule, respondent adopts and incorporates by reference the supplemental arguments submitted by petitioner Graham.

In this case, as in Recuenco III, there was no error in the information: the State alleged that Williams-Walker was armed with a firearm where it could have alleged a deadly weapon enhancement or not

sought any enhancement at all. That was the choice of the State at the time it filed the information. *See Id.*, 63 Wn.2d at 436.

But the State did not submit a firearm special verdict to the jury as it could have done. Instead, the State took no exception to and is now bound by the deadly weapon special verdict that was submitted together with the further specific instruction that a firearm is a deadly weapon.⁴

"Instructions are intended to enable jurors to apply rules of law to the facts of the case." *State v. O'Donnell*, 142 Wn. App. 314, 324, 174 P.3d 1205 (2007) (*citing City of Seattle v. Richard Bockman Land Corp.*, 8 Wn. App. 214, 217, 505 P.2d 168 (1973), *rev. denied*, 82 Wn.2d 1003 (1973)).

Based on the specific instructions given herein, the jury made findings supporting the enhancements sought at trial by the State. Thus, as in *Recuenco III*, there was no error in the jury's finding that Williams-Walker was guilty of committing the crimes while armed with a deadly weapon. 63 Wn.2d at 436.

Just as in *Recuenco III*, the error in this case occurred when the trial judge imposed a sentence enhancement for something the State did not ask for and the jury did not find. Therefore, the firearm sentence must

⁴ CP 294 CP 299, 301. Where the State voluntarily elects to omit language in the charging document or instructions, the State assumes the burden of proving the elements as instructed or charged. *See State v. Nam*, 136 Wn. App. 698, 706, 150 P.3d 617 (2007).

be vacated and the matter remanded for correction of the sentence. Id. at 442.

3. Pursuant to RAP 10.1(g), Williams-Walker adopts and incorporates by reference the arguments of petitioner Ruth.

Williams-Walker also adopts and incorporates petitioner Ruth's independent state constitutional analysis under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), as well as petitioner's supplemental arguments under Recuenco III.

F. CONCLUSION

For all the reasons stated, respondent asks this Court to hold that under Recuenco III, the imposition of the firearm enhancements was improper, and to remand for resentencing based on the jury's verdicts that he was armed with a deadly weapon.

Respectfully submitted August 29, 2008.

//smg//
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